Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri Malaysia & Anor and other applications

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS R2–25–394 OF 2010, R2–25–395 OF 2010 AND R2–25–491 OF 2010
ROHANA YUSUF J
14 JULY 2011

Administrative Law — Judicial review — Application to quash decision of Home Affairs Minister to ban three books — Whether content of three books prejudicial to public order — Whether there was any illegality or error in jurisdiction committed by Minster in making impugned orders — Whether reasonable Minister appraised of facts of present case would be objectively satisfied that actions of applicants were prejudicial to public order — Printing Presses and Publications Act 1984 s 7

After considering the advice and report of the *Bahagian Kawalan Penerbitan dan Teks Al-Quran*, the Minister of Home Affairs arrived at the decision to gazette three books entitled *Perak Darul Kartun, 1 Funny Malaysia* and *The March to Putrajaya — Malaysia's New Era is at Hand* ('the three books') as undesirable publications. The Minister found the content of the three books to be prejudicial to public order and ordered the banning of the three books pursuant to s 7 of the Printing Presses and Publications Act 1984 ('the Act'). The authors and/or publishers of the three books ('the applicants') filed three separate judicial review applications to quash the decision of Minister on the grounds of illegality, procedural impropriety and irrationality. As the three applications raised similar grounds, they were heard together. It was the applicants' contention that the banning of the three books was in contravention of arts 5, 8 and 10(1)(a) of the Federal Constitution. The applicants submitted that the right to free speech and expression was not always confined to speeches which were favourable and that these three books, which were intended to be a form of political satire, should not be taken too seriously. The main issue for determination in these appeals was whether a reasonable Minister appraised of the facts of the present case would be objectively satisfied that the actions of the applicants were prejudicial to public order.

Held, dismissing the applications and making no order as to costs:

(1) Although s 7(1) of the Act empowered the Minister with the subjective discretionary power to prohibit the publication or circulation of a book on the grounds that it was prejudicial to public order, recent decisions were in favour of requiring the court to ascertain whether the satisfaction of the Minister had been properly exercised in law, especially in cases

involving issues of fundamental liberties. Further the Federal Court had now determined that the fundamental liberties guaranteed by the Federal Constitution should be interpreted in line with the doctrine of procedural and substantive fairness in art 8(1) of the Federal Constitution (see paras 18–20).

(2) It was found that the Minister in the present case had sufficient material for him to arrive at a satisfactory decision. The Minister had stated that the contents of the three books were offensive in that they depicted the leadership of the country as corrupt with low moral esteem, which in the opinion of the Minister could be viewed as having the effect of trying to corrupt the minds of readers. The Minister also found that all three publications had tarnished the confidence in the judicial system. Further, the third publication was found to undermine the judicial system as well as the enforcement agencies of the government and was thus, according to the Minister, capable of creating instability in the society as well as the potential of destabilising the public order. In the circumstances there was no illegality or error in jurisdiction committed by the Minister in making the impugned orders. The Minister had taken into account all the relevant facts before him in the exercise of his discretion and this court should not supplant the Minister's objective decision with its own. As long as the Minister was satisfied that the material before him had the potential to disrupt public safety or public tranquility, it would come within the scope of public order (see paras 22–26, 34 & 36).

(3) This court found that the two foreign cases cited by the applicants could not help to resolve the issue at hand and thus did not merit any consideration (see para 29).

(4) In matters involving public order and national security, as in this case, the preservation of public order and national security prevailed over the legitimate expectation of the applicants, if any (see para 44).

(5) The additional ground of challenge in that the seizure of the third book was illegal was without merit. The exercise of seizure prior to the banning of the books was an investigative process and investigation was not liable to the judicial review process. In any case, since the order eventually made justified the seizure, the issue of illegality for failure to follow the provision of the statute could not arise (see paras 50, 52 & 53).

[Bahasa Malaysia summary

Selepas mempertimbangkan nasihat dan laporan Bahagian Kawalan Penerbitan dan Teks Al-Quran, Menteri Hal Ehwal Dalam Negeri memutuskan untuk mewartakan tiga buku bertajuk *Perak Darul Kartun, 1 Funny Malaysia* dan *The March to Putrajaya — Malaysia's New Era is at Hand* ('ketiga- tiga buku) sebagai penerbitan yang tidak diingini. Menteri mendapati kandungan ketiga-tiga buku memudaratkan ketenteraman awam dan

mengarahkan pengharaman ketiga-tiga buku yang berikutan s 7 Akta Mesin Cetak dan Penerbitan 1984 ('Akta'). Pengarang dan/atau penerbit ketiga-tiga buku ('pemohon') memfailkan tiga permohonan semakan kehakiman yang berasingan untuk membatalkan keputusan Menteri atas alasan ketaksahan, prosedur yang tidak betul dan tidak rasional. Oleh kerana ketiga-tiga permohonan membangkitkan alasan-alasan yang sama, kesemuanya didengar bersama-sama. Adalah hujahan pemohon bahawa pengharaman ketiga-tiga buku bertentangan dengan perkara-perkara 5, 8, 10(1)(a) Perlembagaan Persekutuan. Pemohon mengemukakan bahawa hak kebebasan bersuara dan ekspresi tidak semestinya terhad kepada ucapan-ucapan yang baik dan bahawa ketiga-tiga buku, yang bertujuan untuk menjadi satu bentuk satira politik, tidak boleh diambil terlalu serius. Isu utama yang harus diputuskan dalam rayuan ini adalah sama ada seorang Menteri yang munasabah yang menilai fakta-fakta kes ini akan secara objektifnya berpuas hati bahawa tindakan pemohon tidak memudaratkan ketenteraman awam.

Diputuskan, menolak permohonan dan tidak membuat perintah terhadap kos:

(1) Walaupun s 7(1) Akta memberikan kuasa kepada Menteri dengan kuasa budi bicara yang subjektif untuk melarang penerbitan atau pengedaran sesebuah buku atas alasan bahawa ia memudaratkan ketenteraman awam, keputusan kebelakangan memihak kepada yang mana memerlukan mahkamah untuk menentukan sama ada kepuasan Menteri telah sempurna dilaksanakan dalam undang-undang, terutamanya dalam kes-kes yang melibatkan isu-isu kebebasan asasi. Seterusnya, Mahkamah Persekutuan kini telah memutuskan bahawa kebebasan asasi yang dijamin oleh Perlembagaan Persekutuan hendaklah ditafsirkan selaras dengan doktrin keadilan prosedur dan substantif di bawah perkara 8(1) Perlembagaan Persekutuan (lihat perenggan 18–20).

(2) Didapati bahawa Menteri dalam kes ini mempunyai bahan yang mencukupi untuk beliau membuat keputusan yang memuaskan. Menteri telah menyatakan bahawa kandungan ketiga-tiga buku telah menyinggung perasaan yang mana ia menggambarkan kepimpinan negara sebagai dicemari dengan moral diri yang rendah, yang pada pendapat Menteri boleh dilihat sebagai mempunyai kesan cuba merosakkan minda pembaca. Menteri juga mendapati bahawa ketiga-tiga penerbitan telah mencemarkan keyakinan terhadap sistem kehakiman. Selanjutnya, didapati bahawa penerbitan buku yang ketiga melemahkan sistem kehakiman serta agensi-agensi penguatkuasaan kerajaan dan dengan itu, menurut Menteri, mampu mewujudkan ketidakstabilan di kalangan masyarakat serta berpotensi tidak menstabilkan ketenteraman awam. Dalam keadaan ini adalah tidak menyalahi undang-undang atau kesilapan di dalam bidang kuasa yang dilakukan oleh Menteri dalam membuat perintah yang dipersoalkan.

Menteri telah mengambil kira semua fakta yang relevan di hadapannya dalam menjalankan budi bicaranya dan mahkamah ini tidak perlu menggantikan keputusan objektif Menteri dengan keputusannya sendiri. Selagi Menteri berpuas hati bahawa material-material di hadapannya mempunyai potensi untuk mengganggu keselamatan awam atau ketenteraman awam, ia jatuh dalam skop ketenteraman awam (lihat perenggan 22–26, 34 & 36).

(3) Mahkamah ini mendapati bahawa kedua-dua kes asing yang dinyatakan oleh pemohon tidak dapat membantu untuk menyelesaikan isu ini dan oleh itu tidak mewajarkan apa-apa pertimbangan (lihat perenggan 29).

(4) Dalam perkara-perkara yang melibatkan ketenteraman awam dan keselamatan negara, seperti dalam kes ini, pemeliharaan ketenteraman awam dan keselamatan negara berkuasa atas jangkaan sah pemohon, jika ada (lihat perenggan 43–44).

(5) Alasan tambahan bahawa penyitaan buku ketiga adalah menyalahi undang-undang adalah tanpa merit. Menjalankan penyitaan sebelum pengharaman buku adalah satu proses penyiasatan dan penyiasatan tidak bertanggungan ke atas proses semakan kehakiman tersebut. Dalam mana-mana kes, memandangkan perintah akhirnya mewajarkan penyitaan tersebut, isu ketaksahan bagi kegagalan untuk mematuhi peruntukan statut tidak timbul (lihat perenggan 50, 52 &53).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 249–308.

Cases referred to

Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi & Ors [2004] 4 MLJ 86, HC (refd)

Cheah Foong Chiew v Lembaga Jurutera Malaysia [1999] 3 MLJ 110, CA (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 307; [2010] 1 CLJ 300, FC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)

Hong Kong, Chung Chi Cheung v The King [1993] AC 160, PC (refd)

Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337, SC (refd)

Lau Peng Chin & Ors v Tawau Municipal Council [2010] 2 CLJ 827, CA (refd)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356 (refd)

Ministry for Immigration v Teoh (1995) 183 CLR 237, HC (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)

Mukong v Cameroon Communication NO 458/1991, UN Human Rights Committee (HRC) (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 5 MLJ 193, CA (refd)

Reg v Home Secretary Ex p Simms [2000] 2 AC 115, HL (refd)

SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)

Legislation referred to

Cooperative Societies Act 1993 s 67
Federal Constitution arts 5, 8, 8(1), 10, 10(1)(a), Part II
Human Right Commission 1999
Internal Security Act 1960 s 73(1)
Printing Presses and Publications Act 1984 ss 4(4), 6, 7, 7(1), 13A, 13B, 16, 16(2), 17, 17(2), 18, 19(3), (4)

K Shanmuga (Edmond Bond with him) (Azzat & Izzat) for the applicants.
Noor Hisham Ismail (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Rohana Yusuf J:

[1] There are three judicial review applications before me, to quash the decisions of the Minister of Home Affairs ordering the banning of three publications pursuant to s 7 of the Printing Presses and Publications Act 1984:

(a) the application in Suit No R2–25–394 of 2010 (Suit 394) is by Sepakat Efektif in relation to the banning of a book entitled *Perak Darul Kartun*;

(b) the application in Suit No R2–25–395 of 2010 (Suit 395) by Mkini Dotcom Sdn Bhd is in relation to the banning of a book entitled *1 Funny Malaysia*; and

(c) the application in Suit No R2–25–91 of 2010 (Suit 491) by Yong Thy Chong and Oriengroup Sdn Bhd is in relation to the banning of a book entitled *The March to Putrajaya — Malaysia's New Era is at Hand.*

[2] The first two applications (Suit 394 and Suit 395) were heard together in one hearing. Suit 491 was heard at a later date. The grounds raised are common in all the three applications. With agreements of all parties the three

applications were set down together on the same date for decision.

INTRODUCTION

[3] In Suit 394 the book *Perak Darul Kartun* is a cartoon compilation drawn by Zuikiflee bin SM Anwarul Haque (who carries the pen name as Zunar) and several other cartoonists. The book is exhibited as exh SE3.

[4] In Suit 395 the book *1 Funny Malaysia* is a cartoon compilation drawn by Zunar alone. The book is exhibited as exhibit as PC3. Both these two publications are banned under the order issued by the Minister known as Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tidak Di ingini) (No 5) Perintah 2010. The content of *1 Funny Malaysia* have been previously published online through the online news portal *Malaysiakini* from October 2006 till 18 November 2009. Both books have been in publication and distribution since 28 November 2009.

[5] The publication in Suit 491 *The March to Putrajaya — Malaysia's New Era is at Hand* published by the Oriengroup Sdn Bhd and is authored by the first applicant Encik Yong Thye Chong, whose pen name is KIM QUEK. This book is banned under Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tidak Diingini) (No 6) Perintah 2010. It is exhibited as exh K1.

[6] All these three publications, where applicable will be referred to collectively as 'the books'.

GROUNDS OF CHALLENGE

[7] All the three applications are challenging the orders of the Minister grounded on illegality, procedural impropriety, and irrationality. The ground on alleged illegality is premised upon two main bases. First, the fact that the books if objectively viewed are not prejudicial to public order hence the Minister's exercise of power under s 7 of the Act is for an ulterior or improper motive. Secondly, the books contain opinions in the form of political satire, criticising government policies and administration of governance. Thus the applicants contended that the banning of the books is in contravention of arts 5, 8 and 10(1)(a) of the Federal Constitution.

[8] The ground alleging procedural impropriety is made on the basis of no opportunity to be heard been given, plus no reason was cited by the Minister in making the respective orders. The challenge on unreasonableness is premised on the fact that the content had been in circulation for three years, and the books themselves have been in circulation three months before the banning orders were issued.

[9] In addition, Suit 491 posed an additional ground of challenge in that the seizure of the book was illegal, for failure to follow the provision of the statute.

ILLEGALITY

[10] Accepted arguments by both parties on this point is that the Minister in exercising his discretion is opened to an objective assessment by this court in order to determine that all the pre conditions in the exercise of his power must be satisfied. Hence in accordance with our jurisprudence the decision of the Minister cannot be regarded final despite the statutory formula of s 7 of the Act. The absolute discretion granted by the statute must still stand the test of whether it has been properly exercised in law.

[11] The issue of public order and decision taken on such ground is a question of law as stated in *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356. It was observed in that case that the correct view is that, the deciding authority has to have reasonable ground in arriving at its decision,and it is not sufficient for him to think he merely has reasonable ground. Such an approach is clearly emphasised in the recent Federal Court decision in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300.

[12] In relation to compilation *Perak Darul Kartun* the honourable Minister in his affidavit states that the publication makes despicable remarks about the judicial system of the country and governmental enforcement agencies, in paras 14.6.1–14.6.5 of encl 6 he states as follows:

> 14.6 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut untuk memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan. Antara contohnya adalah:
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> 14.6.1 Pada m/s 5 hingga 14 buku tersebut (m/s 37 hingga 46 Eksibit SE-3 Afidavit Sokongan Pemohon) dimuatkan cerita 'Darul kartun' yang mengisahkan tentang krisis pelantikan Menteri Besar Perak dan gambarkan bahawa Menteri Besar Perak iaitu Datuk Seri Zambry Abdul Kadir dan kerajaan pimpinannya sebagai 'kerajaan primitive' yang membelakangkan demokrasi dan kedaulatan undang-undang, sedangkan umum mengetahui bahawa Datuk Seri Zambry Abdul Kadir telah disahkan oleh mahkamah sebagai Menteri Besar Perak yang sah.
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> 14.6.2 Pada m/s 8 dan 10 buku tersebut (m/s 40 dan 42 Eksibit SE-3 Afidavit Sokongan Pemohon) digambarkan FRU sebagai 'perkakas' dan 'balad' kerajaan Barisan Nasional yang melakukan keganasan

kepada rakyat Negeri Perak, yang jelas menuduh bahawa FRU merupakan satu badan yang berpihak kepada satu-satu parti politik dalam menjalankan tugas.

14.6.3 Pada m/s 15 buku tersebut (m/s 47 Eksibit SE-3 Afidavit Sokongan Pemohon) digambarkn Pollis Diraja Malaysia (PDRM) hanya mempunyai reaksi pantas dan bersungguh-sungguh apabila pihak Barisan Nasional membuat aduan manakala tidak mengendahkan aduan yang dibuat oleh pihak Pakatan Rakyat, yeng jelas menuduh bahawa PDRM merupakan satu badan yang berpihak kepada satu-satu parti politik dalam menjalankan tugas.

14.6.4 Pada m/s 58 buku tersebut (m/s 88 Eksibit SE-3 Afidavit Sokongan Pemohon) digambarkan seorang pegawai Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) sedang mencekik dan bergelut dengan seekor harimau dan dilabelkan tempat tersebut sebagai 'Pusat latihan Jangka Pendek Pegawai SPRM' dan digambarkan pada masa yang sama seorang pegawai SPRM yang lain mengatakan bahawa latihan sedemikian akan diteruskan selagi Barisan Nasional Berkuasa, yang jelas menuduh bahawa SPRM merupakan satu badan yang tidak bebas dan melatih pegawai-pegawainya untuk melakukan keganasan dalam menjalankan tugas.

[13] In relation to the other book '1 Funny Malaysia', the honourable Minister in his affidavit in encl 7 affirmed and makes the following observations at para 14:

14.1 bahawa Bahagian Kawalan Penerbitan dan Teks Al-Quran, Kementerian Dalam Negeri setelah mengkaji isi kandungan buku tersebut mendapati buku tersebut:

14.1.1 Memuatkan isu-isu politik tanah air yang menggambarkan pemimpin negara sebagai korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan lain yang bersifat mencerca; dan

14.1.2 memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaaan kerajaan,

14.2 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut memuatkan gambaran bahawa pemimpin negara adalah korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan yang lain bersifat mencerca. Antara contohnya adalah:

14.2.1 Pada m/s 12 buku terseut (m/s 44 Exsibit PCS Afidavit Sokongan Pemohon) digambarkan bahawa mantan Perdana Menteri Malaysia Tun Abdullah Ahmad Badawi mengatakan 'Anybody got information on corruption, please come forward, my door is always open…' tetapi pada digambarkan pintu penjara.

14.2.2 Pada m/s 23 buku tersebut (m/s 55 Eksibit PC-3 Afidavit Sokongan

Pemohon) digambarkan bahawa mantan Perdana Menteri Malaysia Tun Dr Mahathir Mohamad mudah lupa ketika inkuiri kes VK Lingam.

14.2.3 Pada m/s 45 buku tersebut (m/s 77 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa Perdana Malaysia Dato' Sri Najib Tun Razak adalah seorang yang berselera besar sehingga rakyat tertindas, yang jelas menuduh beliau meletakkan kepentingan peribadi mengatasi segalanya.

14.2.4 Pada m/s 58 buku tersebut (m/s 90 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa mantan Perdana Menteri Malaysia Tun Dr Mahathir Mohamad adalah seorang penipu.

14.3 Bahawa gambaran sedemikian merupakan tuduhan yang bersifat dasyat, keterlaluan dan satu penghinaan kepada pemimpin negara yang pastinya akan menjatuhkan maruah dan menjejaskan kredibiliti kepimpinan mereka.

14.4 Bahawa tuduhan-tuduhan tersebut tidak pula bersandarkan kepada sebarang bukti yang kukuh dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh dldapati. Antara contohnya adalah:

14.4.1 Pada m/s 24 dan 33 buku tersebut (m/s 56 dan 65 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa mantan Perdana Menteri Malaysia Tun Abdullah Ahmad Badawi adalah boneka kepada menantunya. Khairy Jamaluddin yang jelas menuduh beliau dikawal oleh menantunya dalam memimpin negara, tetapi tidak pula dinyatakan buktinya dan / atau pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

14.4.2 Pada Pada m/s 37 buku tersebut (m/s 69 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa mantan Perdana Menteri Malaysia Tun Dr Mahathir Mohamad mengakui bahawa skrip sodomi adalah milik beliau yang jelas menuduh beliau sebagai dalang dalam konspirasi menjatuhkan Anwar Ibrahim, tetapi tidak pula dinyatakan buktinya dan / atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

14.4.3 Pada Pada m/s 43 buku tersebut (m/s 75 Eksibit PC-3 Afidavit Sokongan Pemohon) terdapat terdapat illustrasi yang jelas menggambarkan dan menuduh Pardana Menteri Malaysia Dato' Sri Najib Tun Razak sebagai seorang 'playboy', seorang pemimpin berkuku besi dan lain-lain tuduhan, tetapi tidak pula dinyatakan buktinya dan / atau tidak pula dinyatakan dan mana sumber-sumber maklumat tersebut boleh didapati.

14.4.4 Pada Pada m/s 44 buku tersebut (m/s 76 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan mantan Perdana menteri Malaysia Tun Abdullah Ahmad Badawi rnemegang buku agama dengan tangan kanan dan rmemegang dan menyembunyikan buku konspirasl di belakang beliau dengan tangan kiri yang jelas menuduh

beliau berpura-pura alim dan terlibat dalam kospirasi, tetapi tidak pula dinyatakan buktinya dan / atau tidak pula dinyatakan dan mana sumber-sumber maklumat tersebut boleh didapati.

14.4.5 Pada Pada m/s 55 buku tersebut (m/s 87 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa Perdana Menteri Malaysia Dato' Sri Najib Tun Razak adalah boneka kepada mantan Perdana Menteri Malaysia, Tun Dr Mahathir Mohamad yang jelas menuduh beliau dikawal oleh Tun Dr Mahathir Mohamad dalam memimpin negara, tetapi tidak pula dinyatakan buktinya dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

14.5 Bahawa tuduhan-tuduhan sebegini, walaupun dibuat dalam bentuk kartun atau sindiran, secara efektifnya telah membelakangkan kedaulatan undang-undang dan suatu penyalahgunaan hak kebebasan bersuara. Selain itu, ia juga secara efektifnya menafikan fungsi agensi-agensi penguatkuasaan kerajaan yang dipertanggungjawabkan di sisi undang-undang untuk menyiasat apa-apa juga salah laku atau kesalahan oleh mana-mana orang, sekiranya ada.

14.6 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut untuk memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan. Antara contohnya adalah:

14.6.1 Pada m/s 15 buku tersebut (m/s 47 hingga 46 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan bahawa hakim dalam membuat keputusan dipengaruhi oleh kanaikan pangkat dan juga wang ringgit dan turut digambarkan bahawa Ketua Hakim Negara adalah boneka kepada VK Lingam dan terdapat frasa 'Rule by Lawyer' yang jelas menggambarkan sistem kehakiman negara yang korup.

14.6.2 Pada m/s 16 buku tersebut (m/s 48 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan situasi sekiranya peguam VK Ungam dituduh di Mahkamah, peguambela VK Lingam mengatakan kepada Hakim 'My Lord, before the trial begins, please be reminded mat my client appointed you' dan hakim membalas 'correct, correct, correct yang jelas menggambarkan sistem kehakiman negara yang korup.

14.6.3 Pada m/s 70 buku tersebut (m/s 102 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan seorang hakim menjatuhkan dacing yang melambangkan keadilan dan menggantikannya dengan lambing dacing Barisan Nasional, yang jelas menuduh sistem kehakiman negara yang tidak adil dan berpihak kepada satu-satu parti politik.

14.6.4 Pada m/s 71 dan 10 buku tersebut (m/s 103 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan anggota Polis Diraja Malaysia (PDRM) dan FRU menyanyikan lagu 'it doesn't matter who's wrong

or right, just beat it, beat it' yang menggambarkan PDRM dan FRU melakukan keganasan kepada sesiapa sahaja dalam menjalankan tugas mereka.

14.6.5 Pada m/s 63 dan 10 buku tersebut (m/s 95 Eksibit PC-3 Afidavit Sokongan Pemohon) digambarkan pegawai Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) memegang dacing lambang Barisan Nasional dan terdapat frasa 'MACC-Everybody is innocent until joining opposition' yang jelas menggambarkan dan menuduh SPRM sebagai badan yang berpihak kepada satu-satu parti politik dan tidak bebas daripada pengaruh politik dalam menjalankan tugas.

[14] The book *The March to Putrajaya — Malaysia's New Era is at Hand* exhibited as K1 is made up of about 361 pages containing 12 parts on the following topics:

(1) Making the right political decision
(2) The Perak Constitutional Crisis
(3) The Altantuya Murder
(4) Najib's Ascension To Premiership
(5) Election Mar 2008-Pakatan Rises, BN Declines
(6) Anwar Sodomy 11
(7) The Impaired Judiciary
(8) The Perennial Troubling Police
(9) Teoh Beng Hock's Tragic Death
(10) Race And Religion
(11) Abdullah's Control — Less Years
(12) Mahathir's last Hurray

Each of these parts contains a number of chapters.

[15] Accordingly in his submission learned counsel for the applicants Encik Edmond Bon (Encik K Shanmuga with him) drew the attention of this court that these articles are in fact collections of essays that were available on various websites and they are not new. As the topics suggest, the book gives a critical comment on the various issues relating to political episodes and crisis following the general election of March 2008, a criticism on the judiciary and the judges in relation to their decisions in the respective cases being tainted, the police force, the Royal Commission set up on Teo Beng Hock's death being a deception, etc. In learned counsel submission, in totality the book is to be viewed as a reasonable criticism of political issues and is matters of public

interest done in a normal political discourse. That being the position learned counsel contended, the decision to ban this book on ground of public order is irrational.

[16] Responding in his affidavit in reply the Minister (in encl 12) states the following:

> 2.5 Saya selanjutnya ingin menyatakan bahawa sebelum memutuskan untuk mengeluarkan Perintah Larangan tersebut, saya telah mempertimbangkan perkara-perkara yang berikut:
>
> 25.1) Bahawa Bahagian Kawalan Penerbitan dan Teks Al-Quran, Kementerian Dalam Negeri setelah mengkaji isi kandungan buku tersebut mendapati buku tersebut antara lainnya:
>
> 25.1.1 Memuatkan tulisan berunsur penipuan dan hasutan kearah membenci pemimpin tertinggi negara dan pentadbiran Kerajaan;
>
> 25.1.2 Memuatkan tulisan yang membangkitkan isu-isu sensitif iaitu perkauman dan agama; dan
>
> 25.1.3 Memuatkan tulisan yang membangkitkan kemarahan dan kebencian terhadap agensi-agensi penguatkuasaan kerajaan dan sistem kehakiman negara.
>
> 25.2) Bahawa saya sendiri setelah meneliti kandungan buku tersebut dan pada pemahaman saya mendapati penjara-penjara berikut:
>
> 25.2.1 Dalam bab bertajuk 'Making the Right Political Decision', penulis antara lainnya telah mengecam sistem demokrasi yang diamalkan di negara ini dan mangatakan bahawa sistem pemerintahan negara ini adalah berlandaskan diskriminesi kaum, penindasan dan rasuah. Penulis turut menuduh terdapat agenda jahat dilaksanakan oleh kerajaan terhadap masyarakat Kristian di Sabah dengan cara membenarkan pendatang asing beragama Islam masuk secara beramai-ramai ke Sabah.
>
> 25.2.2 Dalam bab bertajuk 'The Perak Constitutional Crisis', penulis antara lainya telah menulis bahawa telah berlaku perebutan kuasa di Negeri Perak yang mengakibatkan peralihan kuasa pemerintahan kerajaan Negeri Perak secara tidak sah, dan telah menuduh bahawa Suruhanjaya Pilihanraya dan Badan Kehakiman Negara telah sama-sama bersubahat dan bersetongkol dalam peralihan kuasa tersebut.
>
> 25.2.3 Dalam bab bertajuk 'The Altantuya Murder', penulis antara lainya telah mengecam cara penyelesaian pasukan polis dan cara perjalanan perbicaraan satu kes pembunuhan seorang warganegara Mongolia bernama Altantuya. Penulis juga cuba mengaitkan kejadian berkenaan dengan perkara pembelian

kapal selam Scorpene oleh pihak kerajaan yang dikatakan penulis sebagai suatu skandal yang melibatkan pemimpin tertinggi negara.

25.2.4 Dalam bab bertajuk 'Najib Ascention to Premiership', penulis antara lainya telah mendakwa terdapatnya kontroversi dalam penyerahan jawatan oleh YAB Dato' Seri Abdullah bin Hj. Ahmad Badawi kepada YAB Dato' Seri Mohd Najib bin Tun Abdul Razak yang mana kononnya tidak diperkenan oleh Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong pada awalnya,

25.2.5 Dalam bab bertajuk 'Election Mar 2008 - Pakatan Rises, BN Declines', penulis antara lainya telah menuduh sistem pemerintahan yang diamalkan kerajaan sebagai prejudis kepada perkauman dan turut mendakwa bahawa kaum India telah dipencilkan dan telah menjadi mangsa akibat sistem pentadbiran sebegini.

25.2.6 Dalam bab bertajuk 'Anwar Sodomy 11', penulis antara lainnya telah menuduh bahawa pertuduhan yang dikenakan terhadap Dato' Seri Anwar bin Ibrahim atas kesalahan seksual yang dilakukannya terhadap seseorang yang bernama Saiful Bukhari adalah satu pertuduhan yang dirancang secara bersesama oleh polis, KDN dan parti politik yang memerintah negara iaitu Barisan Nasional.

25.2.7 Dalam bab bertajuk 'The Impaired Judicial', penulis antara lainya mendakwa bahawa sistem pemilihan Hakim yang di negara ini tidak mempunyai kriteria tertentu tetapi berdasarkan kroni politik dan akibatnya membawa kepada penyalahgunaan kuasa.

25.2.8 Dalam bab bertajuk 'The Perennially Troubling Police Force', penulis antara lainya menggambarkan pasukan PDRM berada pada tahap yang teruk bukan sahaja dalam masalah disiplin dan intergriti tetapi juga mengamalkan rasuah dan menyalahgunakan kuasa kononnya telah mengakibatkan ketenteraman awam telah menjunam ke tahap yang menguji kesabaran rakyat penulis juga turut mendakwa terdapat penglibatan Ketua Polis Negara (Tan Sri Musa Hassan) dengan dunia jenayah.

25.2.9 Dalam bab bertajuk 'Teoh Beng Hock Tragic Death', penulis antara lainya telah menuduh Suruhanjaya Pencegahan Rasuah Malaysia terlibat dengan konspirasi politik dan berat sebelah dalam menjalankan tugas-tugasnya.

25.2.10 Dalam bab bertajuk 'Race and Religion', penulis antara lainya mengatakan bahawa kaum Cina di Malaysia dan Indonesia dipinggirkan kerana tidak mengamalkan sistem meritokrasi.

Penulis berpendapat kesemua jawatan utama dalam sektor awam, polis, tentera dan sektor kewangan dikawal kerajaan dan disisi oleh kaum Melayu.

25.2.11 Dalam bab bertajuk 'Abdullah Control-Less Years', penulis antara lainnya menempelak pentadbiran Tun Abdullah bin Hj Ahmad Badawi sebagai lemah dan penyebab kepada kemasukan pendatang asing di Sabah, rasuah yang berleluasa, wujudnya Negara polis dan skandal pembelian kapal selam.

25.2.12 Dalam bab bertajuk 'Mahathir Last Hurray', penulis antara lainya telah menyelitkan beberapa andaian negatif berkaitan pembatalan pembinaan jambatan bengkok yang mana dikatakan telah menimbulkan kemarahan Tun Mahathir bin Mohamad dan seterusnya menuduh Syarikat Gerbang Perdana Bhd yang sepatutnya menjalankan kerja-kerja pembinaan jambatan adalah kroni Tun Mahathir.

25.3) Bahawa walaupun penulis pada dasarnya menyenaraikan rentetan beberapa peristiwa dan isu-isu yang menjadi perhatian umum, termasuklah yang dibincangkan dengan meluas dalam media cetak sama ada media arus perdana atau media parti pembangkang dan laman-laman sesawang, namun, apa yang ditulis adalah dan andaian dan perspektif penulis yang negatif dan tidak bersandar pada bukti-bukti kukuh atau fakta yang adil.

25.4) Bahawa andaian dan perspektif negative yang diberikan terhadap sistem pemerintahan negara, badan kehakiman Negara dan pasukan penguatkuasa seperti Polis dan SPRM sebegini menjurus kepada menghasut rakyat supaya membenci kerajaan secara keseluruhannya dan keadaan ini amat memudaratkan ketenteraman awam.

[17] It is clear from the above affidavits in relation to his subjective satisfaction the Minister states that in arriving at his decision, he was satisfied that it was necessary to *Gazzette* the books as undesirable publications after considering the advice and report received from *Bahagian Kawalan Penerbitan dan Teks Al-Quran* which studied the content and found them to be prejudicial to public order.

[18] The Minister listed out his examination of the books and issued the ban under s 7 of the Act. Section 7(1) empowers the Minister with subjective discretionary power which is conferred in his absolute discretion to prohibit publication or circulation of a book on ground of prejudicial to public order.

[19] Recent decisions are in favour of requiring the court to ascertain whether the satisfaction of the Minister has been properly exercised in law, especially in cases involving issues of fundamental liberties. This is found in the Federal Court decision in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara*

& other appeals [2002] 4 MLJ 449. It was held, inter alia, that although the court will not question the executive's decision what 'national security' requires under s 73(1) of the Internal Security Act 1960 but it will examine whether the decision is in fact based on consideration of national security. Recently again this position was reinforced by the Federal Court in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 3072; [2010] 1 CLJ 300 when it states the following:

> Applying this test which apart from being binding precedent is the correct statement of law in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that the court must ask itself is whether a reasonable Minister appraised of the material set out in the statement of facts would objectively be satisfied that the action of the appellant were prejudicial to public order.

[20] There is also another factor that needs to be borne in mind in dealing with issues involving fundamental liberties. The Federal Court decision in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, advocated that fundamental liberties guaranteed under the Federal Constitution must be generously interpreted with a prismatic approach to be adopted. In relation to art 10 as applicable to the present case, the restriction must be read with the word reasonable into it as found in the judgment of the Federal Court in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213. The Federal Court now has determined that the fundamental liberties guaranteed by Part II of the Federal Constitution must be interpreted in line with the doctrine of procedural and substantive fairness in art 8(1).

[21] In the upshot of these discussions the question pertinent to be asked in the present case are these; whether the ban of the books are reasonably necessary for the purpose of preventing public order. Looking at it in another way, following the question that was posed in *Darma Suria* the question to be posed is this, whether a reasonable Minister appraised of the materials set out in the statement of facts would objectively be satisfied that the actions of the applicants here are prejudicial to public order.

[22] On the facts of the present case in my view there are sufficient materials before the Minister to arrive at the decision that he so did. My reasons are as below.

[23] In the first two publications it was stated by the Minister that the publications are offensive under two broad contents. The various parts of the books depict the leadership of the country as corrupt, with low moral esteem, and these are done in the nature of ridicule and revile and despicable. The

books, in the opinion of the Minister can be viewed as having the effect of trying to corrupt the mind of readers and having seditious tendency. They are publications that will instill hatred and suspicion and prejudices within the race which is so prejudicial to the public order in this country. For example, the condemnation towards the judiciary was found to be so contemptuously done according to the Minister. This, he said, would instill a negative perspective and will tarnish the confidence in the judicial system. These are found in all the three publications as averred in the affidavits of the Minister.

[24] The publication in the third application, *The March to Putrajaya — Malaysia's New Era is At Hand* contains 361 pages, with 12 parts with each part containing a number of chapters. Besides containing the two broad items as found in the other two publications, according to the Minister it also touches on other sensitivities. It contains writings that insinuate that the government rule in adopting a democratic system is based on racial discrimination and suppression of certain group. Also it contains writing which accused the government of involving in agenda against the Christian community in Sabah and suppressing the Indian community. Many chapters are contemptuous of the judiciary as well as various enforcement agencies of the government such as the police force. All these, according to the Minister will undermine the judicial system as well as the enforcement agencies of the government. Further, according to the Minister they would create instability in the society and have the potential of destabilizing public order.

[25] The chapters on *impaired judiciary*, The Teoh Beng Hock's death, race and religion according to the Minister are some of the writings that can be and potentially dangerous to public order. Further to that accordingly the content are wholly unsubstantiated to form a fair criticism or political comment as suggested by the applicants.

[26] Now back to the questions posed in *Darma Suria* that I have earlier alluded to. Whether a reasonable Minister appraised of the materials set out in the statement of facts would objectively be satisfied that the actions of the applicants here were prejudicial to public order. In my considered view there is sufficient material before the Minister to arrive at his satisfaction. The Minister substantiated his decision by referring to the specific chapters and scrutinised the contents of the books and explain the content which undermine administrative system, judiciary and some that can cause instability of public order. The Minister further had carefully done his perusal and reading of the books before forming his opinion in coming to his decision, as disclosed in the affidavits in reply.

[27] In this regards, learned counsel for all applicants contended that the right to free speech and expression is not always confined to speeches which are

favourable. In their submissions learned counsel in the Suit 394 and 395 further stressed that these three books are political satire and as the word suggest should not be taken too seriously.

[28] Two cases by the European Courts of Human Rights were cited on the importance of freedom of speech. In *Reg v Home Secretary Ex p Simms (HL(E))* [2000] 2 AC 115 a decision of the UK Prison Services to deprive a prisoner of visits by journalists was struck down as a violation of fundamental rights to freedom of expression of the prisoners. Another is the case of *Mukong v Cameroon* as reported in the International Covenant on Civil and Political Rights report (No 451/1991). This case was from Cameroon, involving a journalist who wrote against a one party system and advocated multi-party democracy in the country. He claimed that his books were banned or prohibited from circulation. The UN Human Rights Committee found in his favour on the basis that legitimate objective of strengthening national unity cannot be achieved by attempting to muzzle advocacy of multi-party democracy and found it to in violation of article 19 of the Covenant.

[29] Having considered these two cited decision, it must be appreciated in my view, that these foreign cases cannot help to resolve the issue at hand. The consideration that merits the kind of decision and matters that can affect public orders in a country like Malaysia has its own set of intricacies that may differ between us and other countries. With respect I do not find these foreign cases too compelling for my consideration.

INTERNATIONAL OBLIGATION

[30] Learned counsel also argued that doctrine of legitimate expectation in relation to international obligation on the part of the government should dictate the Minister to observe that obligation. In this regard the applicants make reference to Universal Declaration of Human Rights (UNDHR). Accordingly Malaysia ratified two international conventions on human rights and has enacted Human Rights of Malaysia Act 1998, recognising the UNDHR and becomes member of the Human Rights Council of the United Nations. Reference to the Bangalore Principle which is the concluding statement of the judicial colloquium held in Bangalore India. Two main statements made at The Bangalore Principle as explained by Justice Kirkby in his article *The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from Antipodes* (1993) 16 UNSWLJ 363:

> The Bangalore principle acknowledged that in most countries of the common law such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:
>
> (a) There is a growing tendency for national courts to have regard to these

international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete;

(b) It is within the proper nature of the judicial process and well-established judicial function for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[31] Learned counsel also referred to the decision of the High Court of Australia in the case of *Ministry for Immigration v Teoh* (1995) 183 CLR 237. In that case the High Court of Australia remarked that:

> Ratification of a convention is a positive statement by the executive government of this country to the worid and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent of statutory or executive Indications to the contrary that administrative decision makers will act in accordance with the Convention …

[32] Also cited in support of the applicants, the Privy Council case from *Hong Kong, Chung Chi Cheung v The King* [1993] AC 160. The guidance of Lord Atkin in approaching the Banglore principle amongst which is that; International laws will not become part of laws until enacted by Parliament and judges will not accept it automatically unless as guidance to fill up any lacuna as a guidance of a general principle of international law accepted by community of nations. Judges may ascertain from these materials, the relevant rule and may incorporate into domestic laws.

[33] In Malaysia the *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, shows the position adopted, has been not to directly accept the international law norms unless they are incorporated into the domestic law by our Legislature. Even after the enactment of the Human Rights Commission Act 1998, though s 4(4) of the Act makes it clear that regards shall be had to the UNDHR, it is only to the extent that, it does run inconsistent with the Federal Constitution. As pointed out by Mohamad Ariff J, in the decision of *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377, the judicial approach taken in the Australian case of *Teoh* had a fair share of criticism even in Australia and formed part of what is called 'a titanic struggle' between the Australian Government and the judiciary over power to review executive decision.

[34] Premised on all the above reasons I do not find illegality or error in jurisdiction committed by the Minister in making the impugned orders. The

Minister had in the exercise of his discretion taken into account all the relevant facts before him, in arriving at his decision. I do not believe this court in the exercise of judicial review jurisdiction should supplant the Minister's objective satisfaction with its own, unless the bounds of illegality are transgressed, in the sense explained above.

[35] 'Prejudicial to public order' does not necessarily refer to the existence of actual public order, but include 'potential' to disrupt public order. This was the position taken by the Federal Court in *Darma Suria*. In that case the Federal Court observed that:

> … whether the act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would be prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquility.

[36] In the present case the argument posed by learned counsel that despite the fact that the books were circulating long before the ban, yet there was no report of them being prejudicial to public order is not a consideration as stated in *Darma Suria*. So long as the Minister is satisfied based on the material before him it has the potential to disrupt public safety or public tranquility, it would suffice, for it to come within the scope of public order.

[37] In that same light I find that the limitation on fundamental liberties conferred under art 10 has to be necessarily constrained in meeting the need for a public order of the society at large.

PROCEDURAL IMPROPRIETY

[38] The submissions of learned counsel for all the applicants on this issue of procedural impropriety is premised on the question of whether or not the statute provide for a right to be heard, when a person is adversely affected by the decision be it judicial, quasi judicial or administrative. This is particularly so when the administrative action restricts fundamental liberties under the Federal Constitution (see *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 5 MLJ 193).

[39] It was also argued that the Parliament had ousted right to be heard in certain provisions under the Act. Judicial review has been ousted under provisions relating to licensing and permits under ss 13A and 13B. No ouster clause is found in relation provision in s 7. Furthermore no reason was given for making the order except that the book was banned because it was 'prejudicial to public order'.

[40] First, the law does not mandate the second respondent any duty to consult the applicant prior to the making the order, nor any duty to give reasons for the making of the order. The legal principle of procedural impropriety was laid down by Lord Diplock in the case *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 as follows:

> I have described the third head as 'procedural impropriety' rather than *failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.* This is because *susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even when such failure does not involve any denial of natural justice.*

[41] Lord Fraser of Tullybelton had stated the legal principle to consult in the case of Council of Civil Service Unions as follows:

> It is clear that the employees *did not have legal right to prior consultation* … But *even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.* This subject has been fully explained by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124; [1983] 2 AC 237 and I need not repeat what he has so recently said. *Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.*

[42] No provision under Act 301 that obliges the Minister to accord legal right to the applicant to be heard. As to whether the applicants have legitimate or reasonable expectation, they must first go through the two main tests as stated in the Court of Appeal in *Lau Peng Chin & Ors v Tawau Municipal Council* [2010] 2 CLJ 827, after referring to *Council of Civil Service Unions.* They are these:

(a) he must be permitted by decision maker to enjoy and which he can legitimately expect to be permitted to continue; or

(b) he has received assurance that the benefit or advantage will not be withdrawn without notice or opportunity to advance reasons for extending it should not be withdrawn.

[43] There is no evidence to suggest that there was any consultation made between the respondent either prior to or at the time the books were published. Furthermore there is no evidence that there was promise either expressly or by necessary implication made by the respondent to the applicant that he will be allowed to continue publishing the books so as to entitle him to rely on the

doctrine of legitimate expectation. In my view, the applicants here have no legal right to prior consultation, nor any legitimate expectation of having such right.

[44] Further to that in matters involving public order and national security as in this case, the preservation of public order and national security prevails over legitimate expectation of the applicants. This principle was also laid down by Lord Fraser of Tullybelton in the case *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 as follows:

> In the present case the evidence shows that, since GCHQ began in 1974, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly, in my opinion, *if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction* of 22 December 1983. The next question, therefore, is *whether it has been shown that consideration of national security supersedes the expectation* … I am accordingly of opinion that *the respondent has shown that the decision was one which not only could reasonably be based, but was in fact based, on considerations of national security, which outweighed what would otherwise have been the reasonable expectation on the part of the appellants for prior consultation.*

DUTY TO GIVE REASONS

[45] Learned senior federal counsel contended that the second respondent has no duty to give reasons for the making order. There is no provision in Act 301 which stipulates the Minister's duty to give reason in making his order and in this regard, the Supreme Court in the case of *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 held as follows:

> what is clear from the decided cases, however, is that t*he courts cannot compel the Minister to give reasons for his decision where there is no duty to do so: Minister of Labour, Malaysia v Sanjiv Oberoi & Anor*.

[46] Based on these arguments in my view, there is therefore no breach of procedure or any procedural impropriety that has been committed by the respondent in making the banning orders.

SEIZURE

[47] In Suit 491 the applicants brought up on additional ground. They challenged the seizure made by the respondent's representative at Ayer Keroh Mall in Melaka. The applicants contended that s 18 only allows officers to seize and determine the book if he is empowered either under s 16 or s 17. Under s 6, an authorised officer has to be empowered by a search warrant issued by a magistrate. Under s 17, an 'Authorised Officer' can detain, open and examine

any package or article which he suspects to contain prohibited publication or any publication liable to be prohibited under s 7(1). 'Authorised Officer' is defined as any police officer, an officer of custom, and officer of Postal Services Department and any other public officer declared by the Minister to be an 'Authorised Officer'. The applicants contended that no warrant was produced the applicants in conducting the seizure. Hence it is not a case of a search made by search warrant. Also the applicants contended it cannot be a case of a search under s 16(2) because the search was not done by senior authorised officer (defined as police officer not below the rank of assistant superintendent). The seizure was made only by a Chief Inspector (Ketua Inspektor Nahar bin Yaman). Thus the seizure made at the Melaka Shopping centre at Ayer Keroh was not in compliance with the Act. The applicants contended that s 17 does not apply, because that provision only deals with publication found in a package. Since the search cannot be argued to be one done under s 16 nor s 17, s 18 cannot become operative. Any search purportedly made under s 18 is therefore unlawful.

[48] Above all these the applicant contended that the respondent failed to comply with s 19(3), and 19(4). Under s 19(3) the owner of seized publication can give written notice to the senior authorised officer to claim the seized items. Then the senior authorised officer, pursuant s 19(4) must refer to the Minister for his direction to either release, destroy or to be referred to court for determination.

[49] The applicants issued written notice claiming the seized books. The notice was acknowledged in the affidavit of the respondents. These affidavits disclosed that they failed to refer to the Minister as required under the law. The Minister subsequently failed to act in accordance with the provisions of the law.

[50] It was contended that the seizure was therefore is in direct contravention of the applicants' right to freedom of expression under art 10(1)(a) of the Federal Constitution. It also contravenes art 13 as the applicants can only be deprived of their property save in accordance with law.

[51] The seizure was also challenged on the grounds of irrationality and disproportionate to the objectives of the Act. This is because at the time of seizure these books are not prohibited publication.

[52] First, it is useful to look into what is the exercise of seizure by the respondent. The exercise of seizure prior to the banning of the books is in fact is an investigative process by the respondent. Quite clearly the third respondent to fifth respondent seized the book in the course of carrying out inspection at the outlet on the suspicion that the books are liable to be prohibited under s 7(1) of the Act. It is therefore investigative in nature.

[53] Investigation is not liable to judicial review process. This was the decision in *Ahmad Azam bin Muhamad Salleh Ors v Jabatan Pembangunan Koperasi & Ors* [2004] 4 MLJ 86. In that case it was held that a decision made under s 67 of the Cooperative Societies Act 1993 is not reviewable because relates to an inspection or an inquiry (see also *Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110). In any case, since the order eventually made, justified the seizure, the issue on illegality cannot therefore arise.

Based on the all the above reasons I hereby dismiss the applications of the applicants and I make no order as to costs.

Applications dismissed and no order as to costs made.

Reported by Kohila Nesan